

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Debbie Maldonado
Tax Registry No. 900089
120 Precinct
Disciplinary Case Nos. 2010-287 and 2010-1855

The above-named member of the Department appeared before me on
November 3, 2011, charged with the following:

Disciplinary Case No. 2010-287

1. Said Sergeant Debbie Edwards, while assigned to 120th Precinct, on or about and between August 1, 2008 and September 30, 2009, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Sergeant associated with an individual who was reasonably believed to be engaged in and/or had engaged in criminal activities, to wit: said Sergeant maintained a personal relationship with [REDACTED], an individual who is a known associate of the "Gambino Crime Family."

P.G. 203-10, Page 1, Paragraph 2 (c) – PUBLIC CONTACT – PROHIBITED
CONDUCT

2. Said Sergeant Debbie Edwards, while assigned to 120th Precinct, on or about and between August 1, 2008 and August 8, 2008, while off-duty, failed to notify the Department that she was interviewed by another law enforcement agency, to wit: said Sergeant was interviewed by Federal Bureau of Investigations Special Agent Gregory Kies regarding her knowledge of [REDACTED]'s affiliation with organized crime and failed to notify the Department. (*As amended*)

P.G. 203-10, Page 1, Paragraph 2 (c) – PUBLIC CONTACT – PROHIBITED
CONDUCT

3. Said Sergeant Debbie Edwards, while assigned to 120th Precinct, on or about and between January 1, 2009 and September 30, 2009, while on-duty, and while off-duty,

improperly used her Department cellular phone for non-Department purposes, to wit: said Sergeant made numerous personal calls on her Department cell phone to telephone numbers in New Jersey and to a collision shop owned by [REDACTED], absent a Departmental purpose.

P.G. 203-06, Page 1, Paragraph 16 – PUBLIC CONTACT – PROHIBITED
CONDUCT

Interim Order # 35 s. 94 - Use of Department Cellular Phones

4. Said Sergeant Debbie Edwards, while assigned to 120th Precinct, on or about and between January 7, 2008 and September 24, 2008, wrongfully engaged in unauthorized off-duty employment, to wit: said Sergeant worked as an aerobics and/or dance instructor for L.A. Fitness located in Richmond County, New York, without first obtaining the requisite permission to do so, as required. (*As amended*)

P.G. 205-40, Page 1, Paragraphs 1 and 2 – OFF DUTY EMPLOYMENT

5. Said Sergeant Debbie Edwards, while assigned to 120th Precinct, on or about December 1, 2009, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Sergeant impeded an official Department interview in that she provided incomplete and/or inaccurate answers during the aforementioned interview regarding the aforementioned off-duty employment. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT

Disciplinary Case No. 2010-1855

1. Said Sergeant Debbie Edwards, while assigned to the 120th Precinct, while on sick report, on or about October 8, 2009, from approximately 1110 hours and 1347 hours, was wrongfully and without just cause absent from said residence without the permission of said Sergeant's District Surgeon and/or Health Services Division Sick Desk supervisor.

P.G. 205-01, Page 2, Paragraph 4 – REPORTING SICK

2. Said Sergeant Debbie Edwards, while assigned to the 120th Precinct, while on sick report, on February 4, 2010, was wrongfully and without just cause absent from said residence without the permission of said Sergeant's District Surgeon and/or Health Services Division Sick Desk supervisor. (*As amended*)

P.G. 205-01, Page 2, Paragraph 4 – REPORTING SICK

3. Said Sergeant Debbie Edwards, while assigned to the 120th Precinct, while on sick report, on or about and between February 17, 2010 and February 18, 2010, was wrongfully and without just cause absent from said residence without the permission of said Sergeant's District Surgeon and/or Health Services Division Sick Desk supervisor and said Sergeant traveled to a New York Sports Club located in Matawan New Jersey, absent the requisite permission to do so. (*As amended*)

P.G. 205-01, Page 2, Paragraph 4 – REPORTING SICK

P.G. 205-01, Page 6, Additional Data

The Department was represented by Javier Seymore, Esq., Department Advocate's Office, and the Respondent was represented by Andrew Quinn, Esq.

The Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2010-287

Respondent is found Guilty of Specification Nos. 2 and 4. Respondent is found Not Guilty of Specification Nos. 1 and 5. The Department moved to Dismiss Specification No. 3.

Disciplinary Case No. 2010-1855

Respondent is found Guilty of Specification Nos. 1 and 2. Respondent is found Not Guilty of Specification No. 3.



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

November 15, 2011

Memorandum for: First Deputy Commissioner
Attention: Chief of Personnel

**Subject: ADMINISTRATIVE TRANSFER OF A UNIFORMED MEMBER
OF THE SERVICE**

1. **P.O. Gregory Durand, Tax # 900301**, was recently the subject of Disciplinary Case No. 86030/10.

2. Separate and apart from the disciplinary process, the Police Commissioner directs that P.O. Durand be transferred to a PSB Precinct enforcement command located **within** the confines of Patrol Borough Queens South, subject to the exigencies of the Department.

3. Further, P.O. Durand will not be the subject of any future transfer without the explicit approval of the Police Commissioner.

4. Forwarded for necessary attention.

BY DIRECTION OF THE POLICE COMMISSIONER

Michael E. Shea
Assistant Chief
Commanding Officer
Police Commissioner's Office

APPROVED

NOV 15 2011
RAYMOND W. KELLY
POLICE COMMISSIONER



POLICE DEPARTMENT

September 15, 2011

MEMORANDUM FOR: Police Officer Gregory Durand
Tax Registry No. 900301
Fleet Services Division
Disciplinary Case No. 86030/10

The above-named member of the Department appeared before Assistant Deputy Commissioner Grappone on June 16, 2011, and August 11, 2011, and before me on September 6, 2011, charged with the following:

1. Said Police Officer Gregory Durand, while assigned to PSA #9, while on-duty, at about 0120 hours on August 11, 2008, at New York Hospital Queens, Queens County, was discourteous to Ernette Barnes, to wit: After Ms. Barnes' son was allegedly sexually assaulted, and Respondent was investigating said sexual assault, Respondent made a discourteous comment to Ms. Barnes that minimized the seriousness of the allegation.

P.G. 203-09 – PUBLIC CONTACT

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Ernette Barnes and Matthew Wasserman as witnesses

Ernette Barnes

Barnes, a resident of [REDACTED], is the mother of three children. She does not drink alcohol and was not drinking on August 10 and 11, 2008. She takes "about 80" medications a day for [REDACTED]. On August 10, 2008, she took medication at four o'clock in the morning. The medications that she takes do not make her drowsy or make her speech slurred at all.

On August 11, 2008, at about 1 a.m., Barnes received a call from her mother telling her to come over. Upon arriving at her mother's building a block away, Barnes saw emergency medical technicians (EMTs) attending to her then-18-year-old son, [REDACTED], who was on the floor inside her mother's building beneath the mailboxes and wet with his own vomit and blood. At the time, [REDACTED] lived with Barnes' parents and cared for Barnes' mother, who was cancer-stricken.

[REDACTED] tried to tell her what happened but kept on going in and out of consciousness. Barnes later found out from her son that he had gone to the home of [REDACTED] to get a phone cord and was served liquor.

Also on the scene were two police officers, one who she described as short with black hair and the other one taller with blond hair. She could not identify either of the officers as present in the courtroom with one hundred percent certainty.

Barnes claimed the officers and the EMTs were "giving obscenities" to her son, calling him "a nigger," and saying that he cannot be believed because he was drunk. Barnes claimed that the responders were "not doing anything to help him" and "not even testing to see if he [was] drunk." She said she felt "aggravated" because the police did not help and "did nothing except yell obscenities at [her] son."

Twenty minutes later, [REDACTED] was transported to [REDACTED] Hospital. Barnes did not ride in the ambulance with her son because she was "too busy being put in the hold by one of the officers." She claimed that the black-haired officer held her with her arm bent toward the rear for "a minute or two." She went to the hospital with her father. Once at the hospital, [REDACTED] was placed in the "drunk tank," a room where he was to "sleep it off." She felt he was not getting any help because he was not hooked up to an intravenous bag (IV), so she took him out of that hospital and brought him to [REDACTED] Hospital, where he got the IV, blood work was done and a rape kit was prepared.

Once [REDACTED] was situated, she called the police and a female sergeant arrived, along with the two officers who were at her mother's building. She told the blond officer he could speak to [REDACTED] so long as he was "not going to sit there and yell more obscenities at him." Additionally, she claimed the officer said "[s]omething that means oral sex: fellagio, fellegio, fellatio, fellagio." She said, "I don't remember the word that he was using but he was saying, '[W]hat's a little fellation.'" She said she could not remember the word that the officer used, "fellatio," when she went to the Civilian

Complaint Review Board (CCRB) but the word meant "oral sex " Barnes claimed the officer said, "Just a little fellatio it's no big deal " This made her "upset" and "aggravated "

Barnes did not file a civil lawsuit regarding this case but she did contact CCRB about a week after the incident Barnes learned from [REDACTED]'s" aunt, who is like an aunt to Barnes' children, that [REDACTED] got five years on probation for the incident involving [REDACTED]

On cross-examination, Barnes said the name of the person arrested for what he did to her son is [REDACTED]¹ At the time, [REDACTED] was over 20 years old and living with his aunt in Barnes' parents' building

On the date of the incident, after receiving her mother's phone call and going to her mother's building, Barnes found [REDACTED] slouched but upright against a wall on the lobby floor, about six or seven feet from the apartment door where he lived with Barnes' parents He had vomit and blood on his shirt and was surrounded by Barnes' parents and an EMT who "kept calling him nigger" She did not recall seeing the police upon her arrival

She could not tell right away that [REDACTED] had consumed alcohol, and could not smell alcohol on him even when she bent down to him, despite the EMT saying that he was drunk [REDACTED] was going in and out of consciousness and she told them that if [REDACTED] had been drinking, it was not just alcohol To her knowledge, [REDACTED] had never drank alcohol before then She said the EMT, who was black, was "[p]ushing [REDACTED]'s] head

¹ Wright was referred to as Latuan's "cousin" in testimony, however, according to Barnes, Wright's aunt is "like an aunt to my children so we're all like family "

against the wall, calling him a nigger trying to yank his chain off his neck He kept saying that he was a nigger and that he was drunk don't believe him, it's not true "

Barnes said she and the EMT were engaged in "a back-and-forth" regarding the veracity of what [REDACTED] was uttering Her son was telling her "bits and pieces" and was fading in and out, recounting that he went upstairs to see [REDACTED] about a cord He had not yet revealed to her what [REDACTED] did At that time, the blond officer, who she named as Respondent, also stated, "[N]o, that didn't happen he's just drunk you can't really put too much in what he's saying "

Barnes did not recall being told to step back or given commands by the police to clear the area while [REDACTED] was being attended to in the building lobby She denied that she was ever told to get away from [REDACTED] when she went over to him, or that the police ever gave her any instructions during the whole time her son was in the building

It was not until [REDACTED] was "dragged" into the ambulance by the EMTs that her parents told her that a crime had been committed against her son, that her son had informed them that [REDACTED] took him and molested him Took him and fellatioed him " She said the officer would not let her ride in the ambulance after she learned what happened to [REDACTED] She tried to go outside, to get on the ambulance, but the black-haired officer prevented her by putting her in an arm hold and reminding her that the EMTs said she could not ride with them She had insisted on going in the ambulance, but the EMT who was calling [REDACTED] a "nigger" said no, that her son was "of age " Later on, she said the ambulance had left, unbeknownst to her, before she found out what happened to [REDACTED]

Although she does not have medical training, she asserted that the EMTs "[were] supposed to" give her son an IV

By the time she and her father drove to [REDACTED] Hospital, her son was in the drunk tank sleeping on a stretcher and the officers and the EMTs were no longer there. She told a hospital employee what happened, plus the information that her parents also said he had fallen down five flights of stairs because he was drunk. She was not aware if her parents had told [REDACTED] story to anybody before Barnes arrived at the scene. The employee told her that they were only aware that he had been drinking.

Although she did not have a problem with [REDACTED] as a hospital, Barnes took him out of that location and drove him to [REDACTED] Hospital where she told hospital personnel that [REDACTED] had been raped or something to that effect. At this point, she had not gotten the details of what happened from her son.

Barnes agreed that it was fair to say the [REDACTED] performed oral sex on her son, though at the time, she did not know the word "fellatio" and "looked up the word." She agreed that when she spoke to the CCRB investigator, she recounted that the officer stated, "[I]t was a little flatulation some word that they use for oral sex" essentially "a long word with an F." At the time, she could not remember the word that the officer used and told the CCRB investigator that she thought the word meant a certain thing.

The sergeant and the two officers from before showed up at the hospital after Barnes called the police. The blond officer made the "[I]t just a little fellatio" comment in the New York Hospital emergency room. She had not had any conversation with him except for his statements in her parents' building that [REDACTED] was drunk, which she agreed was what the EMT was also saying. She agreed that the EMT and the officer kept calling

██████ "nigger" as well. When asked how many times the word "nigger" was used by the officer, Barnes stated, "Maybe once. He used it once. The EMT used it twice."

Afterwards, she started to tune him out. When asked how many times she thought the officer and the EMT used the word "nigger" to describe or call her son, she answered, "Probably more than four, give or take."

Barnes denied that her demeanor while at her parents' building was frantic. She said she was trying not to panic because she did not know what was going on. She denied that she was yelling and said, "I was calm." She said she was also calm when she got to ██████████ Hospital. She did not yell at anybody and say that they were not doing anything right. She denied that she told anyone to put ████████ on an IV. She denied that she told anyone at that hospital what happened to ████████, and said that "I knew I was taking him out of there. I was waiting with the intent of taking him out of there." She

not happy with the treatment ████████ was receiving at ██████████ Hospital, he was not staying there anyway.

Upon arriving at ██████████ Hospital with ████████, Barnes claimed she was calm there as well, despite her belief at the time that an older person had made her son intoxicated and performed oral sex on him, and then her son had fallen down five flights of stairs. She explained to the sergeant what happened and told her that she did not want to deal with those particular officers, if possible, because of the way they treated her son. She said the blond officer said to her, in front of the sergeant, "Oh, you thought you was to deal with us, but we got news for you, you're going to deal with us."

She said the black-haired officer "never said anything," even when he placed her in the hold

Barnes said that she asked the blond officer for his shield number but he did not want to give it to her. She was able to obtain his shield number because he had to write his shield number because of the rape kit. She said she was able to see his name on his nameplate and his name was Respondent's. The black-haired officer did not have a problem giving her his shield number.

When asked, "[W]here were you when the statement came out about what you originally said is 'it was a little flatulation' which you later amended to 'a little fellatio'?" Barnes said it was said at the nurses' desk in [REDACTED] Hospital. At the time, [REDACTED] was on a stretcher inside a room about five or six feet away. The officer's back was to her when she heard him make this statement. When asked, "You didn't remember what term he used, correct?" Barnes answered, "Yeah, fellatio, flatulation." She did not know the term and went home to look it up. A doctor also explained the term to her. At the time, she knew that [REDACTED] was accused of performing oral sex and not anal rape because [REDACTED] had made that clear to her as she and her father were transporting him.

Barnes agreed that whatever term the blond officer used, she did not understand what he was saying but she knew what he meant, and to her, he was downplaying the fact that it was oral sex. At that point, she had been using the phrase that her son had been raped, and that is what she told the hospital staff. She agreed that the blond officer turned away from her when she heard him make that statement and she did not know what the word was but knew it started with an F and it had to do with oral sex.

"[B]etween a week to a month, give or take" after the incident, she went to the [REDACTED] Her arm was hurting and she wanted to make sure she did not reinjure her shoulder. She was told that it was not a problem.

When she met with the CCRB investigator [REDACTED] went with her. She signed a [REDACTED] who put her in the arm hold and CCRB asked for her records to see if she suffered any injury as a result of that. Her son was also asked to sign a release for his medical records. Barnes denied that she told him not to sign it. She said she told him he was free to do what he wanted to do, and he did not sign it. She denied that she had anything to do with his decision and denied the CCRB investigator's conclusion that she did not allow [REDACTED] to sign the release.

Barnes said [REDACTED] met with a district attorney in relation to his case but did not appear in court for the case against [REDACTED]. "No one informed" her about how the case ended, but she was told by her son that [REDACTED] got five years probation.

On redirect examination, Barnes said that after the ambulance with [REDACTED] departed from her parents' building, the police officers were outside. She did not see them conducting an investigation or interviewing anyone.

On further cross-examination, Barnes agreed that the only information she got from her son while in her parents' building was "something about [REDACTED], he gave him something to drink, and a cord." She did not know when [REDACTED] had told the story to her parents and nor if [REDACTED] had told the events to the EMTs and the officers yet.

Wasserman is a CCRB investigator who has worked for CCRB since December 2008. He was the CCRB investigator assigned the instant case and he took a tape-recorded phone statement from a witness named [REDACTED], a doctor at [REDACTED] Hospital. Wasserman had attempted to get an in-person interview from [REDACTED] by going through the [REDACTED] Hospital legal department but they were not willing to cooperate because the victim did not sign a HIPAA² form [Department's Exhibits (DX) 1 and 1A, tape recording and transcript of Wasserman's contact with [REDACTED] and the [REDACTED] Hospital legal department]

On cross-examination, Wasserman agreed that trying to interview a doctor "is a little bit more difficult" than interviewing complainants. He concurred that the first 14 pages of the transcript (DX 1A) document his efforts to get access to [REDACTED] to interview him. It is not until page 15 that his contact with Mirakhor begins to be documented. Wasserman was refraining from making an appointment for an in-person interview with [REDACTED] depending on what the doctor told him on the phone. He agreed that it is always better to interview people in person so that he can assess the person's demeanor and body language, ensure that he is not being coached and verify his identity.

Wasserman agreed that he wanted to speak to [REDACTED] in person, but that never materialized. He said that [REDACTED] was amenable to a further interview, but the [REDACTED] Hospital legal department was the one who "gave [him] a problem." Wasserman agreed that the [REDACTED]'s interview ended abruptly on the phone, though he claimed that there was "slightly more but it wasn't preserved on the tape. [He] remember[ed] actually setting up an appointment with him [REDACTED]." Wasserman agreed that the interview

² Health Insurance Portability and Accountability Act. Patients must consent to the disclosure of their health information.

ended abruptly and in the middle of the interview, but he insisted that he finished up the interview and arranged to see [REDACTED] although this is not recorded on the tape or in the transcript. Wasserman never got to meet with [REDACTED] and the [REDACTED] Hospital supervisor never returned the several calls he made. He was told by a CCRB lawyer that without a HIPAA release, the hospital would refuse an in-person meeting.

Regarding [REDACTED]'s phone statement, Wasserman said the doctor stated that he remembered the incident and the patient after looking up [REDACTED]'s name before returning Wasserman's call. Wasserman did not know what documents the doctor referred to to refresh his recollection and due to the lack of a HIPAA release, Wasserman was unable to request documents.

Wasserman also agreed that when he asked [REDACTED] if he overheard any comments that police officers made to the patient or his mother or anyone involved with the patient, [REDACTED] responded, "[N]ot that I recall." [REDACTED] remembered the patient and even referred to him as "the one who was assaulted by his cousin." [REDACTED] also

with whether or not the sex was consensual and he was aware that there was an issue with whether what occurred was a true assault or a consensual act that was reported as an assault.

Wasserman recalled asking [REDACTED] point blank, "[D]id you ever hear an officer say to Mr. Barnes, it's just a little fellatio, it's no big deal?" The doctor had responded, "[Y]es, he did say that," followed by "I can't say exactly those words," and, "something to that effect." Wasserman concurred that "he [REDACTED] remembered something about fellatio or oral sex or something of that being mentioned."

Wasserman agreed that at that point in the interview, he knew he wanted to conduct a follow-up in-person interview with [REDACTED] because [REDACTED] had recall of the incident. If he had known that the phone interview was going to be the last time he spoke to [REDACTED], he would have asked a lot more detailed questions, such as what exactly he remembered, who it was said to, and where it was said. The doctor asserted that a male officer made the statement, but Wasserman never ascertained that officer's identity.

In addition to the CCRB-substantiated allegation of an insensitive remark in the present case, Wasserman also investigated allegations concerning the use of force and threats of arrest directed at Barnes. Wasserman agreed that [REDACTED] remembered a hostile situation between Barnes and the officers, although the doctor was unaware of what had transpired prior to the officers threatening to arrest Barnes. Wasserman said the officers were exonerated in regard to the allegations of threatening to arrest Barnes because her behavior in the hospital, according to herself, Respondent, and [REDACTED] amounted to the statute of Disorderly Conduct. Wasserman uncovered that Barnes had been "yelling in the hospital waiting room and thus possibly upsetting other patients, doctors, and the functioning of the hospital."

Wasserman said that the officers were also exonerated of the allegation concerning the use of the arm hold. It was deemed " . . . in the circumstances," considering that Barnes was interfering with the EMTs as they were trying to aid her son. He was never able to find out who the EMTs were who responded that night, they worked for a private ambulance company and [REDACTED]. [REDACTED] Hospital was closed when Wasserman conducted his investigation.

Wasserman did not interview [REDACTED], but he did listen to the interviews of [REDACTED] conducted by another CCRB investigator, Nicholas Harmon. He agreed that based on the accounts of [REDACTED] and other people involved, Barnes was interfering with the EMTs and the officers trying to assist [REDACTED] in the building and it was necessary to use force "to keep her at bay."

Barnes, who signed a HIPAA release, claimed that the arm hold applied to her caused a wrist fracture, however, this was not supported by the medical records [Respondent's Exhibit (RX) A]. Wasserman obtained Wasserman concurred that Barnes' medical records showed that she had a degenerative bone condition, that she went to the hospital for treatment 18 days after the arm hold but stated that the pain had started three days before the arm hold. He said that Harmon's conclusion was that Barnes would not allow [REDACTED] to sign the HIPAA release.

Wasserman determined Barnes' claim that Respondent and the EMT were referring to [REDACTED] as a "big-headed nigger" to be unfounded because it "was completely implausible that an African-American EMT would join in [with Respondent] and say such a thing."

Wasserman agreed that of all the allegations Barnes made against the police, the only allegation that was not unfounded or exonerated was the one at hand concerning the statement, and this was so because he gave a lot of weight to [REDACTED]'s statement.

Wasserman agreed that according to Harmon's interview of [REDACTED], [REDACTED] was 18 years old at the time of the incident and had been drinking with [REDACTED]. [REDACTED] did not assert that he was forced to drink or "was slipped anything." Then, according to [REDACTED], "things happened." Wasserman said there were no real details as to what happened.

between [REDACTED] and [REDACTED] Wasserman did not know the disposition of [REDACTED]'s arrest [REDACTED]n, in his interview, had fragmentary recollection of what happened to him. He remembered the EMTs asking him if he was gay, but he did not make any allegations against the police officers. He never said that anyone was calling him "nigger," and he corroborated that his mother (Barnes) was acting crazy, was very upset and he wanted her to calm down. Wasserman agreed that CCRB determined that a lot of what Barnes said was not credible.

Respondent's Case

Respondent called Police Officer Michael Cortes as a witness. Respondent testified in his own behalf.

Police Officer Michael Cortes

Cortes, assigned to Police Service Area 9, has been a member of the Department for eight years. On August 11, 2008, at approximately 12:45 a.m., Cortes and Respondent responded to a radio run of a sexual assault at [REDACTED]. They knocked on the door and when the door opened, a "very intox[icated]" [REDACTED] fell out of the door, almost [REDACTED] was not answering and was not coherent. When [REDACTED] tried to speak, his speech was very slurred, he smelled of alcohol and he was falling asleep while the officers were trying to talk to him. The officers moved him to the lobby to await the EMTs.

Cortes said that when Barnes arrived in the building, she was "very irate" and "excited" and "seemed to be intox[icated] herself," because she smelled of alcohol. She physically got in between the officers and her son whenever the officers tried to talk to

him or help him stand up. The officers kept telling Barnes, "[Y]ou need to move. We need to render aid to your son." The EMTs came and were trying to put [REDACTED] on a stretcher and Barnes was interfering by holding onto him and grabbing him.

At that point, Cortes grabbed Barnes, pulled her off of [REDACTED], pushed her away and held her so that the EMTs and Respondent could place [REDACTED] on the ambulance. He said he grabbed Barnes by the wrist and pulled on her arm, placing himself between Barnes and everyone else. In the meantime, Barnes was flailing her arms, trying to pull away, walk around him and push past him. Prior to resorting to the use of force, Cortes had given Barnes commands to back off at least thrice. He said he told her to calm down, but neither he nor Respondent threatened to arrest her if she did not calm down. Additionally, he did not recall anyone making any racially inappropriate comments, such as "big-headed nigger."

Respondent rode in the ambulance with [REDACTED] while Cortes followed in their police car. Upon arrival at [REDACTED] Hospital, Respondent informed him that [REDACTED] had, during the ten-minute ambulance ride, confided that the oral sex performed on him by [REDACTED] was consensual. The officers then finalized the job and resumed patrol.

About four or five hours later, Cortes responded to [REDACTED] Hospital with another partner. Respondent, who was on meal, was not with him. Barnes was in the emergency room, "irate, belligerent and yelling." Barnes would not allow him near [REDACTED] and wanted to speak to a supervisor, so Cortes kept his distance. His sergeant arrived, spoke to Barnes, and told Cortes to go to the scene and arrest the perpetrator. Respondent was not at [REDACTED] Hospital while he (Cortes) was there. Barnes made a

CCRB complaint against him alleging excessive force. It was stipulated that CCRB exonerated Cortes.

Cortes did not hear any conversations between Respondent and doctors at either hospital nor did he hear Respondent say anything to Barnes. He never heard Respondent say words to the effect of, "[I]t's no big deal, it's just a little fellatio," nor did Respondent say anything to minimize what had initially been claimed to have happened to [REDACTED].

On cross examination, Cortes said that when he and Respondent got to the scene of the sexual assault complaint involving [REDACTED], there were no other officers there with them. At the time, he was 5'5" in height, weighed 230 pounds and had brown hair. Cortes did not prepare a complaint report until he got to [REDACTED] Hospital because, earlier, after conferring with Respondent, he learned that what had occurred with [REDACTED] was not a sexual assault but a consensual act. He did not document that [REDACTED] retracted his story, nor did he call the detective squad or the district attorney's office. He eventually prepared a complaint report that [REDACTED] alleged that he was sexually assaulted based on a statement that Barnes gave to his sergeant. When he responded to [REDACTED] Hospital, he [REDACTED]. He did not see Respondent there because Respondent was not there at the same time he was there. He was only at the hospital for about ten minutes because the sergeant told him to go to the perpetrator's address and arrest him, which he did.

Respondent

Respondent has been a member of the Department for over 19 years and is currently assigned to the Fleet Services Division. On August 11, 2008, he was assigned to Police Service Area 9 and working with Cortes when they responded to a radio run of a

sexual assault involving [REDACTED] Upon knocking on the door there, it opened and [REDACTED] fell into the hallway, vomiting on himself [REDACTED] was intoxicated, breathing heavy and "sprawled out on the floor," he was "incoherent and wasn't really answering questions "

Barnes appeared from outside and "[s]he was very irate, screaming, very frantic, kind of noticed like an odor of alcohol perhaps on her breath " She ran over to [REDACTED] and was trying to pick him up off the ground The officers told her to stand back so that [REDACTED] could be attended to When her son was placed on a stretcher, Barnes tried to pull him off and words (which Respondent did not recall) were exchanged between her and the EMTs Respondent said that his responsibility was to ensure the safety of the EMTs while they performed their duties and Barnes interfered with that by "physically trying to pull [REDACTED] off the stretcher she pushed one of the EMTs out of the way " After warning her, Cortes removed Barnes' hand off the stretcher and the officers placed themselves in between the stretcher and Barnes

Respondent rode inside the ambulance to try to ascertain what happened With him was one of the EMTs Barnes was banned from the ambulance During the seven-minute ride to the hospital, [REDACTED] calmed down and recounted that he went to someone's house, they were drinking, and the male at the house performed consensual oral sex on him Prior to departing, Respondent assisted the EMTs with bringing [REDACTED] into [REDACTED] Hospital and did not see Barnes there

About four hours later, while he was on meal, he was summoned to [REDACTED] Hospital There, Barnes was "very irate and yelling She was upset to see [him] " Respondent tried to explain to her what was going on, that "it's a serious allegation, but it's not rape [He] was trying to give her the technical terms of actually what happened to

her son " He tried to explain what the allegations were and what her son had told him had happened He tried to explain technically what happened to her son and the difference between rape and oral sex Barnes was still angry and he did not think she comprehended what he tried to explain to her He clarified that having had oral sex performed on him is not considered rape, it is oral sodomy

According to Respondent, there were hospital personnel walking around during the less than ten minutes he interacted with Barnes She never said to him that what he said was wrong or offensive No one from the hospital admonished him for anything Respondent denied he ever said, "[I]t's only fellatio," nor did he recall using the word fellatio He denied he ever said, "[I]t's no big deal, it was only oral sex," as he felt that if what was alleged were to happen, "It is a big deal " Barnes "was loud, screaming," at the hospital and Respondent warned her that if she did not calm down, she could be arrested After that, he left the hospital and had nothing else to do with her Respondent later learned that Cortes responded to the hospital as well, but they were not there at the same time

Respondent denied ever calling [REDACTED] a "big-headed nigger," and no one on the scene used those words, including the two black EMTs He never said anything discourteous to Barnes, nor at any point did he try to minimize what had allegedly happened to her son He had the discussion with Barnes because he was trying to explain to her what happened to her son and he was trying to calm her down, but nothing he said to her ever calmed her down

On cross-examination, Respondent said that at the time of the incident, he was 5'11", weighted 170 pounds and was bald Upon his door opening, [REDACTED] was vomiting

and urinating on himself [REDACTED] was not cooperating with any questions being asked of him and kept saying, "help me, help me, help me " Respondent interviewed Barnes en route to [REDACTED] Hospital and did not prepare a complaint report because, based on his investigation, it was a consensual act and no crime was committed It was fair to say that [REDACTED] was intoxicated, in and out of consciousness, and was not in the right state of mind [REDACTED] was transported to the hospital because of his intoxication, not because he had been assaulted

A rape examination was later conducted at [REDACTED] Hospital Respondent did not document the change in [REDACTED]'s story He did not prepare a complaint report, nor did he notify the detective squad or the district attorney's office Respondent did not recall whether he told his supervisor that [REDACTED] recanted his statement. Respondent went to [REDACTED] Hospital alone and had a conversation with Barnes in the emergency room where he "explained to her the difference between rape and what had occurred to her son " He did not recall how far he was standing from Barnes during this talk

On redirect examination, Respondent agreed that, after hearing [REDACTED] recantation in the ambulance, he notified Cortes within minutes of all the information Cortes had not been privy to because he was not in the ambulance Cortes was ultimately the arresting officer in the case

FINDINGS AND ANALYSIS

Respondent is charged in one specification with being discourteous in that he minimized the seriousness of a sexual assault on [REDACTED] the 18-year-old son of the complainant, Barnes Specifically Respondent is alleged to have told Barnes, "Just a little fellatio it's no big deal " Respondent denies making such a statement

On August 11, 2008, at about 12 45 a m , Respondent and Cortes responded to a radio run at an apartment at [REDACTED] in [REDACTED]s. There, they found a very intoxicated [REDACTED]. There was an allegation that someone had performed a sexual act on [REDACTED]. EMTs arrived, as did Barnes.

There was testimony from both Cortes and Respondent that Barnes was interfering with the efforts of EMTs to remove [REDACTED]. This occurred because she was trying to get close to him while the EMTs were trying to get him on a stretcher. This is credible for a number of reasons. First, Barnes described herself as being a very protective mother and being very upset. Additionally, the officers were exonerated by CCRB with regard to allegations of the use of excessive force. This decision was apparently supported at least in part in a statement made by [REDACTED] regarding his mother's conduct at that time.

[REDACTED] was removed to [REDACTED] Hospital. Respondent accompanied [REDACTED] in the ambulance. Barnes was not present at that time. According to Respondent, during the ride, [REDACTED] confided that the act was consensual. As a result, no complaint report was written at that time.

[REDACTED] was later removed, at Barnes' insistence, to [REDACTED] Hospital. Some hours after the first encounter, Cortes was told to report to that hospital and was directed by a supervisor to arrest the person who had had the sexual contact with [REDACTED]. At about that time, Respondent was also ordered to report to [REDACTED] Hospital, although this was apparently separate and apart from Cortes, who testified that he did not see Respondent at [REDACTED] Hospital. It is not known who was there first, Respondent or Cortes, but both said that they were not there together.

It was during a conversation between Respondent and Barnes at [REDACTED] Hospital that the alleged offensive statement was made. When asked what Respondent said to her, Barnes testified as follows:

Something that means oral sex and I characterized it as fellagio, fellegio because I couldn't remember the word that he was using. But the word fellation, fellagio -- I don't remember the word he was using but he was saying, what's a little fellation. And I'm like -- and I was too -- I was done with him because I was really upset. I was really lost there.

Barnes then acknowledged that she could not remember the word "fallacio" when she made her complaint to CCRB. When asked specifically what Respondent said after he said it's just a little "fallacio," Barnes responded:

He's -- just a little fellatio. And the doctor -- he said it in front of the doctor and the doctor was like, I bet you if your nephew, your son had just a little fellatio, you know, I bet you would be upset. You know, and he told me, well, I'm coming back to get you and I'm like, if you got the balls to come back and get me -- excuse me -- I said, if you got them, then you come back and get me. I bet you you don't. Because that's my child and my job is to protect him. I did it for 18 years. And I had to wait till he got to be 18 for something like this to happen. And this is why young men don't report it.

After receiving this non-answer to her question, the Assistant Department Advocate asked: "After you heard the officer say, it's just a little fellatio, did he say it's no big deal or he just said it's just a little fellatio?" After basically putting the words in the witness' mouth, she got the following reply: "Just a little fellatio. Then he's like, it's no big deal. I was upset with him. I was already upset but I really got upset."

The Department also presented hearsay testimony of [REDACTED], the doctor who treated [REDACTED] at [REDACTED] Hospital. A tape and transcript of his statement, given over

the telephone to CCRB investigator Wasserman was placed in evidence. Among the problems with the statement is the same issue, the questioner essentially put the words into the witness' mouth.

Wasserman had made several efforts to reach [REDACTED] and when he finally got him on the phone, [REDACTED] had reviewed material regarding [REDACTED]. We know this because just about the first thing [REDACTED] said was that he remembered the patient and had looked up the name. When asked if he recalled any comments police officers may have made to [REDACTED] or his mother, [REDACTED] replied, "Not that I recall." When asked if he wanted his recollection refreshed, [REDACTED] said, "No I remember. I remember the patient. The guy was assaulted by his cousin." He went on to say the police were concerned as to whether the sexual act was consensual or not.

Not content, Wasserman specifically asked, "Did you ever hear an officer say to Mr. Barnes it's just a little fellatio, it's no big deal?" At that point, [REDACTED] said, "Yes, he did say that," but he quickly added that he could not say exactly those words were used. When prompted again by Wasserman, he agreed it was "something to that effect." However, he then indicated that the context was about a suspicion the officers had that the sexual encounter had been consensual.

It should be noted that this telephone conversation was somehow disconnected or cut off. [REDACTED] an in-person interview with [REDACTED] but that did not occur nor did [REDACTED] testify at this trial. Apparently, this was because the hospital did not receive a HIPAA release for such testimony. Such a release, of course, was in the control of Barnes and/or [REDACTED].³

³ There was a representation made to the Court that a release was ultimately obtained but that [REDACTED] declined to comply with a Department subpoena to appear.

Given the manner in which the questioning was conducted, further questioning of [REDACTED] would be necessary before [REDACTED]'s statement could be accepted as truly probative evidence. One obvious point of examination would relate to [REDACTED]'s statement that he could not say that those were the actual words used.

Moreover, [REDACTED] stated that whatever the officer said was in the context of a concern the officer had that the sexual encounter was, in fact, consensual. The quoted statement Wasserman suggested to [REDACTED] is not one of concern but of derision. Under those circumstances, [REDACTED] may have mis-remembered what was said or simply agreed to the language presented to him by Wasserman.

While police officers have an obvious responsibility to arrest the perpetrators of crime, they also have a responsibility to avoid arresting people who have not committed crimes. Respondent testified that [REDACTED] had told him in the ambulance that the encounter was consensual so there was certainly a basis for concern as to whether a crime had actually been committed.⁴ As [REDACTED] put it, that was officers' "dilemma."

[REDACTED]'s statement also sheds some light on the hostile relationship between Barnes and the officers. He stated that Barnes started screaming at the police and they threatened to arrest her. This surprised him but he admitted he did not know what they were talking about.⁵

There is no question that Barnes was angry at Respondent. Evidence at this trial, including the CCRB referral, makes clear that Barnes filed numerous complaints against

⁴ In his testimony about the statement made by [REDACTED] to the prior investigator, Wasserman noted that while the issue of the sexual encounter was not fully explored, [REDACTED] indicated that his intoxicated state was voluntary. With regard to the sexual encounter, he testified that [REDACTED] stated that "things just happened." This would tend to indicate that "forcible compulsion," needed to establish a criminal sexual act under the penal law, was not a factor.

⁵ Wasserman testified that he had uncovered evidence that Barnes had been disruptive in the hospital and that she might have been subject to arrest for Disorderly Conduct. Consequently, the officers were exonerated in regard to Barnes' complaint that she had been subject to the threat of arrest.

Respondent and other officers All of those allegations, except the one at issue in this case, were unfounded or exonerated according to Wasserman

██████ did not testify at this trial No explanation was offered for his absence This is significant as he may well have been in a position to hear the offending statement, if it was made Wasserman did not interview ██████ personally but reviewed a statement made by ██████ to a previous investigator Wasserman conceded that ██████'s statement helped establish that some measure of force was needed to keep Barnes from interfering with the EMTs trying aid him ██████ also, apparently, differed with Barnes about some of the other allegations she made regarding derogatory comments that she claimed had been made by police officers It would appear that ██████'s statement formed at least part of the basis for the dismissal of some of the allegations made by Barnes

Barnes obviously believed that ██████ had been the victim of a sexual assault by a male relative When asked what happened with the criminal case, Barnes, who initially refused to provide the name of the relative involved, stated that she believed he was convicted and sentenced to probation

The Assistant Department Advocate represented that she could not confirm the disposition of that case because it had been sealed This Court takes note of the fact that the only way criminal convictions are sealed is if the defendant is a youthful or juvenile offender Those offender statuses can only be granted to offenders under the age of 19 It has been stipulated that the age of the alleged sexual assailant was 25 at the time of the incident The only way a criminal case against a person that age can be sealed is if the charges were dismissed or if the offender was allowed to plead guilty to a non-criminal offense such as Disorderly Conduct The representation by the Department that the record

was sealed, coupled with the acknowledged age of the offender, would tend to indicate that there was no criminal conviction and no probation for that charge

Whether Barnes was correct or incorrect about the nature of the sexual act, the statement allegedly made by Respondent would have been inappropriate. The issue before this Court is whether Respondent made that statement, "Just a little fellatio it's no big deal."

Given Barnes' animus toward Respondent and the manner in which [REDACTED]'s statement was practically extracted from him, serious questions arise as to both reliability and substance of their statements. Additionally, the representations made about why [REDACTED] did not give an in-person interview to Wasserman, or more importantly, why he did not testify under oath at this proceeding, did not provide a satisfactory explanation for his absence. Initially, there was a problem because of the lack of a HIPAA release but that problem was resolved before trial. Nonetheless, and in spite of a subpoena served on the hospital by the Department, [REDACTED] did not testify. Further, [REDACTED] apparently indicated to the Assistant Department Advocate that he did not want to testify. Certainly, this must be considered in assessing what weight, if any, to give to unsworn statements made by [REDACTED] in a telephone conversation.

Considering all of these factors, the Department has not met its burden and Respondent is found Not Guilty.

Respectfully submitted,

APPROVED
NOV 15 2011
[Signature]
RAYMOND W. KELLY
POLICE COMMISSIONER

[Signature]
Martin G. Karopkin
Deputy Commissioner - Trials

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeant Paul Briscoe and Sergeant Steven McCole as witnesses.

Sergeant Paul Briscoe

Sergeant Briscoe, an 18-year member of the service who is presently assigned to the Intelligence Division, testified that he was assigned to Internal Affairs Bureau (IAB) Group 33 from April, 2008 until January, 2011. He was assigned to investigate an IAB log that was generated after the IAB Command Center received an anonymous telephone call. The caller alleged that [REDACTED] ([REDACTED]) was a member of organized crime and that Respondent was having an affair with him. The caller also alleged that Respondent was engaged in unauthorized off-duty employment teaching Zumba dance classes at "LA Fitness," a gym on Staten Island.

On May 5, 2009, Briscoe interviewed Federal Bureau of Investigation (FBI) Special Agent (SA) Gregory Kies. Kies told Briscoe that [REDACTED] was an "associate of the Gambino crime family;" that [REDACTED] was a part-owner of "[REDACTED]" on Staten Island; that FBI surveillances of [REDACTED] indicated that [REDACTED] and Respondent had "some type of relationship;" and that [REDACTED] was cooperating with the FBI in order to receive a lesser sentence of incarceration regarding federal crimes he had committed but had not yet been arraigned on.

Kies also told Briscoe that he and another FBI agent had recently visited Respondent at her residence and that they had asked her if she was willing to speak them

about [REDACTED]. Respondent voluntarily went with the two FBI agents to a Panera Bread restaurant. When the agents asked her what she knew about [REDACTED] she denied having any knowledge of [REDACTED]'s criminal past, but she told them that she was aware that [REDACTED] was going to be sentenced or incarcerated.

Briscoe testified that Respondent should have immediately notified the Department that she had been interviewed by FBI agents. With regard to the charge that Respondent had engaged in a criminal association with [REDACTED], Briscoe testified that this charge was substantiated "not by me, but by my C.O. (commanding officer)."

With regard to the allegation that Respondent had engaged in unauthorized off-duty employment at LA Fitness, on January 2, 2009, Briscoe went to LA Fitness and spoke with the manager, [REDACTED]. When he asked him who taught Zumba there, [REDACTED] told him that the instructor was "Debbie E" who is "a cop." Briscoe testified that Respondent's personnel record showed that her name was "Debbie Edwards."

On April 30, 2009, Lieutenant Robert Zveon and Sergeant Kenny Garcia of IAB interviewed [REDACTED], Respondent's then-husband, at the Family Court building on Staten Island. [REDACTED] told them that he had found out that Respondent was having an affair with [REDACTED]. Although [REDACTED] confirmed that FBI agents had spoken to Respondent, he refused to answer questions regarding what the FBI agents had asked her.

On December 1, 2009, Briscoe conducted an official Department interview of Respondent who was told that she was being interviewed as the subject of misconduct allegations. When Briscoe asked Respondent if she had a relationship with [REDACTED], she stated that she worked with him on the 120 Precinct's Community Council and that she also saw him at charity events held by local community organizations. When Briscoe

asked Respondent if she was employed at LA Fitness, she acknowledged that she had taught introductory Zumba classes there during 2008 in an attempt to start a Zumba program at LA Fitness, but she denied that she was ever a compensated employee of LA Fitness.

On December 15, 2009, Briscoe interviewed [REDACTED] who is the President of the 120 Precinct's Community Council. [REDACTED] confirmed that [REDACTED] was a member of the Council, that he regularly attended meetings and that he had been involved with Council activities for a long period of time. [REDACTED] stated that she was not aware that [REDACTED] was involved in any criminal activity.

On January 19, 2009, Briscoe sent a subpoena to LA Fitness which sought payroll records for "Debbie Edwards" (Respondent's previous surname) during the year 2008. In response to this subpoena, Briscoe received LA Fitness financial records regarding payments made to Debbie Edwards during 2008, but not copies of checks made out to "Debbie Edwards" [Department's Exhibit (DX) 1]. [These records show that Respondent's "hire date" was "1/7/2008" and that she received "pay" starting on "3/6/2008" with a "\$12.00" payment for a "1.00" "Unit to pay" per "CLASS" and that she was later paid in \$25.00 increments for each "1.00" "Unit to pay" per "CLASS." These payroll records also contain the abbreviations "St Tax" and "Loc Tax" underneath the payments amounts.]

On cross-examination, Briscoe confirmed that the IAB Command Center received not just one but, rather, a series of numerous anonymous calls alleging Respondent was having an affair with [REDACTED]. IAB was not able to ascertain the identity of the anonymous caller. Since Kies had told Briscoe that [REDACTED] was "an associate of the

Gambino crime family,” Briscoe called the Department’s Organized Crime Intelligence Division (OCID) and requested that they perform a name check on [REDACTED] regarding organized crime associations. OCID reported “negative” results regarding the check that was performed. Briscoe confirmed that Respondent did not attend any of the court proceedings involving [REDACTED] including his criminal trial.

Since Kies had stated that FBI surveillances indicated that [REDACTED] and Respondent had some type of relationship, IAB conducted a dozen or more surveillances of Respondent over a one-year period but [REDACTED] and Respondent were never seen together. On one occasion, on January 3, 2009, while Respondent was off duty, she was observed getting into a Jaguar which was registered to [REDACTED] but Briscoe was unable to confirm that [REDACTED] was the driver that day.

On re-direct examination, Briscoe testified that he obtained Department records of calls that Respondent made using her cell phone and that they showed that Respondent made 49 outgoing calls to a collision shop owned by [REDACTED] during the period of time from June, 2007 to July, 2008. Briscoe also testified that because at her December 1, 2009 official Department interview, she denied being an employee of LA Fitness and did not provide a clear answer regarding her type of employment there, he issued the subpoena to LA Fitness for her employment records. Briscoe confirmed that although Respondent was not present in court at [REDACTED]’s criminal trial on charges of loan sharking, extortion and money laundering, she did admit that she exchanged text messages with him.

Sergeant Steven McCole

Sergeant McCole, who is assigned to the Medical Division's Absence Control Unit, testified that he was assigned to investigate an anonymous allegation that Respondent was working as a fitness instructor. McCole recalled that on October 8, 2009, Respondent was on sick report, that Respondent went to the Department's Staten Island Medical Clinic (the clinic), and that Respondent signed out of the clinic at 1110 hours and was supposed to travel directly home. McCole drove to Respondent's [REDACTED] residence. He arrived at 1130 hours and conducted surveillance outside her residence. McCole testified that he saw Respondent arrive home at 1347 hours.

McCole further recalled that on February 4, 2010, Respondent was also on sick report, that Respondent again went to the clinic and that Respondent signed out of the clinic at 1151 hours and was supposed to travel directly home. McCole drove to Respondent's residence and conducted surveillance outside the residence. McCole observed Respondent arrive home at 1255 hours. She was carrying a bag that was marked with the name of a store located at the Staten Island Mall.

McCole testified that on February 24, 2010, he went to New York Sports Club on Staten Island and obtained membership records which showed that Respondent's New York Sports Club membership key fob was swiped on February 17, 2010, at 1855 hours at the New York Sports Club gym in Mattawan, New Jersey, and that on February 18, 2010, Respondent's New York Sports Club key fob was swiped at the New York Sports Club gym in Marlboro, New Jersey. McCole determined that on February 17 and 18, 2010, Respondent was on sick report and had no permission to leave her residence.

On cross-examination, McCole testified that based on the normal travel time between the clinic and her residence, Respondent should have arrived home on October 8, 2009 by 1130 hours. McCole confirmed that when he saw Respondent arrive home she was not carrying any bags. McCole testified that based on the normal travel time between the clinic and her residence, Respondent should have arrived home on February 4, 2010, by 1215 hours. McCole confirmed that he did not conduct surveillances of Respondent on February 17 and 18, 2010.

Respondent's Case

Respondent testified in her own behalf.

Respondent

With regard to Disciplinary Case No. 2010-287, Respondent testified that during the late summer of 2008, her marriage to [REDACTED] was dissolving although they were still living together. When she came home one day from work, she found her husband in their home speaking to two FBI agents. She was not surprised because she knew that her husband was friends with a number of FBI agents. The agents asked if they could speak to her alone and she accompanied them to a Panera Bread restaurant where they asked her questions about [REDACTED]'s "character." They did not tell her that [REDACTED] was engaged in criminal activities or that he was a known associate of the Gambino Crime Family. They told her that "they would rather me not tell the Department" that they had spoken to her.

During the week that followed this interview, she became uncomfortable about the circumstances of this interview. She called the Sergeant's Benevolent Association (SBA) office seeking advice and she also consulted with a retired member of the service, Lieutenant [REDACTED] who asked her if she was involved in the investigation and, when she stated she was not, advised her not to report the interview to the Department.

Because she was suspicious of the FBI agents, she contacted the FBI's Office of Professional Responsibility (OPR) and filed a complaint with OPR against SA Kies. In June 2009, when OPR interviewed her about her complaint, NYPD investigators were present. No one at the interview told her that [REDACTED] had a criminal record, or that he had been indicted or that he was a known associate of the Gambino Crime Family. She learned these things a few days later when she called the SBA union counsel.

She testified that she had no personal relationship with [REDACTED] and that her contacts with him all related to the fact that [REDACTED] was a member of the 120 Precinct Community Council. As a Community Affairs officer, her duties involved working with council members and community groups and she regularly contacted [REDACTED] and other Community Council members and would often see them at local charity events. She and [REDACTED] had exchanged cell phone numbers and she regularly called him and other Council members.

Respondent testified that she was never employed at LA Fitness, rather, she had taught some introductory Zumba classes there during 2008 to see if a Zumba program could start at LA Fitness. She was never compensated for these classes and any monies paid to her by LA Fitness were to reimburse her for supplies she had to purchase in order to conduct these classes.

With regard to Disciplinary Case No. 2010-1855, Respondent testified that on February 4, 2010, heavy snow, not a shopping trip to the Staten Island Mall, delayed her arrival home from the clinic and that she always carried the “BB” bag she was seen carrying when she arrived home. Respondent testified that on February 17 and 18, 2010, she did not leave her residence and travel to New York Sports Club gyms located in Matawan and Marlboro, New Jersey. She explained that because her New York Sports Club gym membership needed to be reactivated, she asked her fiancé [REDACTED] to renew her membership and that he did so using her key fob, not her membership card, to swipe at the New York Sports Club gyms in Matawan and Marlboro, New Jersey.

On cross-examination, she testified that on January 3, 2009, when she was observed getting into a Jaguar, she did not know that the car was registered to [REDACTED] that [REDACTED] was not in the car and that [REDACTED]’s brother was the driver. She acknowledged that, because [REDACTED] had been texting her incessantly apologizing to her, she met him for 20 minutes at a restaurant so that she could tell him to stop texting her.

FINDINGS AND ANALYSIS

Disciplinary Case No. 2010-287

Specification No. 1

It is charged that between August 1, 2008 and September 30, 2009, Respondent engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, by associating with an individual who was reasonably believed to be engaged in and/or had engaged in criminal activities, in that she “maintained a personal

relationship with [REDACTED], an individual who is a known associate of the „Gambino Crime Family.“”

It is not disputed that during the time period relevant to this charge, [REDACTED] was a member of the 120 Precinct Community Council and Respondent was a Community Affairs officer whose duties included working with council members. Thus, Respondent was required, as part of her duties, to have regular contact with [REDACTED].

A similar factual situation was presented in Disciplinary Case No. 80805/05 (Trial Commissioner’s Not Guilty finding approved by the Police Commissioner on December 12, 2006). In that case, as here, the Respondent was charged with having violated Patrol Guide Procedure 203-10, (2) (c) by associating with a person reasonably believed to have engaged in criminal activities. In that case, the Respondent police officer was assigned to community policing duties within a housing development which had a pool. Because the Respondent sometimes was stationed at the pool to assist the lifeguards in ejecting unruly youths from the pool area, she had regular contact with the man who supervised the lifeguards and who, the Respondent was aware, was on probation for a criminal conviction. The Department argued that the Respondent was guilty of criminal association because she had exchanged cell phone numbers with the man; because she had placed a dozen calls to his cell phone; because she, on one occasion, had a face-to-face conversation with him outside the pool area; and because a hearsay witness told a Department investigator that she believed that Respondent and the man were involved in a relationship.

The evidence presented by the Department here to prove that Respondent was guilty of criminal association with [REDACTED] is similar to the evidence presented by the

Department in the above cited case. The Department argued that the Respondent was guilty of criminal association because she had exchanged cell phone numbers with [REDACTED]; because she had placed calls and text messages to his cell phone; and because she, on one occasion, had a face-to-face meeting with him; and because a hearsay witness (Respondent's then-husband [REDACTED]) told Department investigators that he believed that Respondent and [REDACTED] were having an affair.

Sergeant Briscoe testified that FBI SA Kies had told him only that the FBI believed that Respondent and [REDACTED] had "some type of relationship." Yet, as Briscoe confirmed, even though IAB conducted a dozen or more surveillances of Respondent over a one-year period, [REDACTED] and Respondent were never seen together.

The Department offered no credible evidence that Respondent and [REDACTED] had a romantic relationship since only the anonymous caller and [REDACTED] asserted that they were having an affair. Briscoe's testimony that he learned from Lieutenant Zveon and Sergeant Garcia that during their interview of [REDACTED] he told them that he "had found out" from someone else that Respondent was having an affair with [REDACTED] constituted third party hearsay at this trial regarding the truth of [REDACTED]'s assertion of an affair.

Also, I find it significant that Briscoe confirmed that Respondent never attended any of the court sessions at [REDACTED]'s criminal trial, although she acknowledged exchanging text messages with him.

Finally, as to that part of the charge that alleges that [REDACTED] is "an individual who is a known associate of the „Gambino Crime Family“" and that Respondent knew this in 2008, although Briscoe testified that Kies told him that [REDACTED] was a Gambino Crime Family associate, the Department did not refute Respondent's testimony that Kies

did not tell her this when he spoke to her. Moreover, Briscoe confirmed that the Department's OCID performed a name check on [REDACTED] regarding organized crime associations and that OCID reported "negative" results for [REDACTED]. Thus, it is not disputed that if Respondent had requested that OCID perform a check on [REDACTED] regarding organized crime associations, OCID would not have reported to her that [REDACTED] was "an individual who is a known associate of the „Gambino Crime Family.“” Moreover, the Department did not refute Respondent's testimony that it was not until June, 2009, that she was first told that [REDACTED] had a criminal record, and that he had been indicted, and that he was an associate of the Gambino Crime Family.

Respondent is found Not Guilty of Specification No. 1

Specification No. 2

It is charged that on or about and between August 1, 2008 and August 8, 2008, Respondent failed to notify the Department that she had been interviewed by another law enforcement agency in that she failed to notify the Department that FBI SA Kies had interviewed her and asked her questions about [REDACTED]'s character.

It is not disputed that Respondent did not immediately notify the Department that she had been interviewed by FBI agents about Benedict. Even if I credited Respondent's unsupported claim that the agents told her that "they would rather" that she "not tell the Department" that they had conversed, such an informal request does not trump Respondent's duty, under the Patrol Guide, to notify the Department about this interview.

Also, even if I credited Respondent's unsupported claims that she informally sought the advice of the SBA and was told by a retired member, Lieutenant [REDACTED]

that under the circumstances there was no need to notify the Department, it is no defense that Respondent failed to comply with a Patrol Guide Procedure because she relied on faulty advice.

Respondent is found Guilty of Specification No. 2.

Specification No. 3

The Department moved to dismiss this charge. The Assistant Department Advocate (the Advocate) stated that since Respondent had reimbursed the Department for certain calls she made using her Department-issued cell phone, without admitting any wrongdoing, the Department was moving to dismiss this charge.

It is recommended that the Advocate's motion to dismiss this charge be granted.

Specification No. 4

It is charged that Respondent, between January 7, 2008 and September 24, 2008, wrongfully engaged in unauthorized off-duty employment by working as an aerobics and/or dance instructor for LA Fitness on Staten Island without permission.

Respondent does not deny that she never submitted an application seeking permission to engage in off-duty employment with LA Fitness on Staten Island and she does not deny that she taught Zumba classes at LA Fitness on Staten Island and she does not deny that she received payments from LA Fitness relating to the classes she taught there. However, Respondent testified that she was never an employee of LA Fitness and that none of these payments constituted compensation for conducting the classes. Rather,

she asserted that all of these payments constituted reimbursement for supplies she purchased with her own money that she needed to conduct the classes.

The payroll records that Briscoe received from LA Fitness regarding the payments made to Respondent during 2008 (DX 1) do not support Respondent's contention that all of these payments constituted reimbursement for supplies she had purchased to use in her classes. These records show that the payments made to her were all in whole dollar amounts starting with a "\$12.00" payment for a "1.00" "Unit to pay" per "CLASS," and increasing to amounts consistent with being paid \$25.00 for each "1.00" "Unit to pay" per "CLASS." These payroll records also reflect whether any "St Tax" or "Loc Tax" was deducted from the payments made to her. Thus, these records are consistent with being paid per hour or per class, and they are inconsistent with Respondent's claim that these payments constituted reimbursement for supplies she had purchased.

Respondent is found Guilty of Specification No. 4.

Specification No. 5

It is charged that Respondent engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that she "impeded" her December 1, 2009, official Department interview by providing incomplete and/or inaccurate answers at this interview regarding her off-duty employment at LA Fitness.

The Advocate asserted that Respondent had impeded her official Department interview by denying that she was a Zumba instructor at LA Fitness and by implying that she was a volunteer at LA Fitness and not an employee.

Briscoe confirmed that at her December 1, 2009, official Department interview, Respondent did not claim that she had no teaching connection to LA Fitness. On the contrary, she acknowledged that she had taught introductory Zumba classes there during 2008 in an attempt to start a Zumba program at LA Fitness. Thus, the Department's position that she impeded her official Department interview rests solely on Briscoe's testimony that she denied being an employee there and that she did not provide a clear answer regarding her type of employment. (Transcript, p. 136) Briscoe testified that based on these answers he took the additional investigative step of issuing a subpoena to LA Fitness to obtain her employment record. However, Respondent is not charged here with impeding an official Department investigation. Rather, she is charged with impeding her official Department interview. Her answer that she was not compensated by LA Fitness as an employee constituted a mere denial of the accusation that she had been engaged in off-duty employment at LA Fitness. The Advocate did not make a convincing argument that these denials in any way impeded her official Department interview and although the Advocate implied that her denials were intentional lies, under Patrol Guide Procedure No. 203-08, the Department could not bring false official statement charges based on these mere denials of misconduct.

Respondent is found Not Guilty of Specification No. 5.

Disciplinary Case No. 2010-1855Specification Nos. 1 and 2

It is charged that on October 8, 2009, and on February 4, 2010, Respondent was wrongfully and without just cause absent from her residence while she was on sick report without the permission of the District Surgeon or the Sick Desk supervisor.

I find Respondent Guilty because I credit the testimony of McCole that on both October 8, 2009, and February 4, 2010, Respondent was on sick report and went to the clinic; that Respondent signed out of the clinic at 1110 hours and 1151 hours, respectively, on those dates and that although she was supposed to travel directly home, a 20-minute trip, he saw Respondent arrive home at 1347 hours and 1255 hours, respectively, on those dates.

Respondent is found Guilty of Specification Nos. 1 and 2.

Specification No. 3

It is charged that on February 17 and 18, 2010, while Respondent was on sick report, she was wrongfully and without just cause absent from her residence without permission and that she traveled to a New York Sports Club gym located in Matawan, New Jersey, without permission.

Unlike Specification Nos. 1 and 2, the Department presented no testimony that Respondent was observed outside her residence at all on February 17 and 18, 2010, much less that she was observed at any New York Sports Club gym locations in New Jersey.

The sole evidence presented by the Department to prove this charge was that New York Sports Club records show that Respondent's New York Sports Club member key

fob was swiped on February 17, 2010, at 1855 hours at the New York Sports Club gym in Mattawan, New Jersey, and that on February 18, 2010, that Respondent's New York Sports Club member key fob was swiped at the New York Sports Club gym in Marlboro, New Jersey. Respondent offered a reasonable explanation for how her member key fob came to be used at these locations on these two dates (that her boyfriend had swiped them for her to renew her membership) and Respondent's statement at her official Department interview that she was unsure as to whether she was in New Jersey on February 17 or 18, 2010, does not constitute an admission.

Respondent is found Not Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y. 2d 222 (1974). Respondent was appointed on July 26, 1991. Information from her personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found guilty of engaging in unauthorized off-duty employment as a dance instructor for nearly nine months. Respondent has also been found guilty of having failed to notify the Department for a one-week period that she had been interviewed by another law enforcement agency. Finally, Respondent has been found guilty of being absent from her residence without permission while on sick report on two occasions, once for a period of two hours and 17 minutes and once for 40 minutes. These two absences took place five months apart.

The Advocate recommended that Respondent be Dismissed from the Department. Although this trial marks the second time that Respondent has been found guilty of Charges and Specifications, her previous misconduct was committed during 1993, nearly two decades ago. Since Respondent has an otherwise unblemished record in 20 years of service, the penalty of termination does not appear to be warranted here.

I therefore recommend that Respondent forfeit 30 vacation days.

Respectfully submitted,

Robert W. Vinal
Assistant Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT DEBBIE MALDONADO
TAX REGISTRY NO. 900089
DISCIPLINARY CASE NO. 2010-287 & 2010-1855

In 2010, Respondent received an overall rating of 3.5 “Highly Competent/Competent” on her annual performance evaluation. She was rated 4.0 “Highly Competent” in 2008 and 3.0 “Competent” in 2009. She has been awarded one medal for Excellent Police Duty and one Commendation. [REDACTED]

[REDACTED] Due to negative performance and behavior, she was placed on Level I-Discipline Monitoring in March 2009. She was upgraded to Level II in April 2010.

Respondent has been the subject of one prior disciplinary adjudication [REDACTED]

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner – Trials